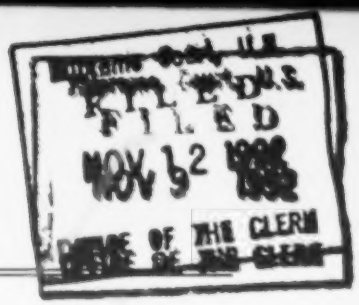

No. 92-626

In The

Supreme Court of the United States

October Term, 1992

CATERPILLAR INC.,

Petitioner,

v.

MICHIGAN DEPARTMENT OF TREASURY, REVENUE DIVISION,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Michigan

REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

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REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

Respondent begins its argument opposing the grant of a writ of certiorari by stating:

> The provisions of Michigan's single business tax pertaining to the capital acquisition deductions which Petitioner challenged were amended by statute in 1991 so the challenge is no longer viable.

Brief for Respondent in Opposition ("Brief for Respondent") at 16. Respondent concludes with the same message:

> Petitioner has already achieved part of its goal and the issues which it raises are moot. The Michigan Legislature has already amended the method of calculating the CAD deductions.

Brief for Respondent at 51. In sum, Respondent suggests that, because the Capital Acquisition Deduction provisions were reformed in 1991, the Court need not address the impact of the prior law on Caterpillar in the years before the Court (1981 through 1984). Collection of unconstitutional taxes in these years can not be so easily excused.

In *The Montana National Bank of Billings v. Yellowstone County*, 276 U.S. 499 (1928), the Court was asked to ignore Montana's collection and retention of unconstitutionally levied taxes because the Montana Supreme Court later repudiated the unconstitutional statute. The Court refused to do so, stating:

> It is true that the state supreme court in the present case expressly repudiated the construction theretofore put by it upon the state statutes in the *Rogers* case, *supra*, and, as already stated, adopted one to the exact contrary. But that does not cure the mischief which had been done under the earlier construction. That construction had already been acted upon by the taxing officials and the application thus made of the statutes had given rise to the present cause of action and an undoubted right to recover thereon. The statutes, as thus construed and applied to the concrete facts of the case, were invalid; and this is enough to justify the challenge here under consideration. *Cudahy Co. v. Parramore*, 263 U.S. 418, 422; *Ward & Gow v. Krinsky*, 259 U.S. 503, 510. Plaintiff in error cannot be deprived of its legal right to recover the amount of the tax unlawfully exacted of it by the later decision which, while repudiating the construction under which the unlawful exaction was made, leaves the monies thus exacted in the public treasury.

276 U.S. at 504 - 505. Here, the Michigan legislature changed the law to meet Caterpillar's constitutional objections, but not for the years before the Court. Caterpillar, like the taxpayer in *Montana National Bank*, cannot be deprived of its right to recover taxes "unlawfully exacted" in the years 1981 through 1984 because the law was belatedly reformed in 1991.

A writ of certiorari should be granted in this case. The decision of the Michigan Supreme Court should be

reversed retrospectively. The case should be remanded to provide Caterpillar relief for the years before the Court.

Respectfully submitted,

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